

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ERIC CLEGG,

Defendant-Appellant.

UNPUBLISHED

July 18, 2013

No. 309991

Wayne Circuit Court

LC No. 11-010656-FH

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227(2), and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1). The trial court sentenced defendant, as a habitual offender, third offense, MCL 769.11, to concurrent prison terms of 1 to 10 years for the CCW conviction and 1-1/2 to 10 years for the felon-in-possession conviction, with the latter sentence to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. Defendant appeals by right, challenging the trial court's denial of his motion for a new trial based on ineffective assistance of counsel. We affirm.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, but the appellate court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). That is, defendant must show that "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Under the first prong of this test, "a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional

conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.” *People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).

Defendant was convicted of possessing a firearm when confronted by two police officers on July 12, 2011. At trial, the officers testified that they approached defendant while he was standing near a parked vehicle on a street. According to the officers, defendant initially backed away as the officers approached him, and then fled on foot and disposed of a gun while fleeing. Although other witnesses were present, the officers were the only witnesses to testify that defendant had a gun. Defense counsel sought to impeach the officers’ testimony regarding the charged incident by introducing evidence of a similar incident involving the same police officers that occurred on September 2, 2011. Defendant contends that counsel’s strategy was unreasonable because evidence of another incident involving him and a gun made it more probable that defendant possessed a firearm in this case.

The decision to pursue a particular defense theory is a matter of trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel properly may argue multiple defenses during the course of a trial. *People v Cross*, 187 Mich App 204, 205-206; 466 NW2d 368 (1991). The decision regarding what evidence to present is also a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Id.* at 76-77. However, counsel may be found ineffective despite a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

The record shows that counsel deliberately introduced evidence of the September 2 incident in order to attack the police officers’ credibility. Although the September 2 incident also involved firearm charges, the evidence did not, as defendant contends, make it more probable that defendant possessed a firearm in this case. On July 12, defendant was confronted by two police officers. According to the officers, defendant did not cooperate with them, ran away from them, and was eventually captured. The officers claimed that defendant disposed of a gun during that encounter, but defendant’s sister testified that defendant did not have a gun. On September 2, defendant was confronted by the same two officers. He did not cooperate with them, ran away from them, and was eventually captured. The officers again claimed that defendant disposed of a gun during that encounter. Defendant’s sister testified that defendant did not dispose of a gun during the September 2 incident, and both officers admitted that they were not sure that defendant possessed a gun during that incident. This evidence had a tendency to show that, as defendant’s sister had testified, defendant did not dispose of a gun on September 2, despite the officers’ claim to the contrary. Defense counsel sought to use that evidence to show that defendant’s sister’s testimony that defendant did not have or dispose of a gun on July 12 should be credited over the officers’ claim to the contrary. Given the circumstances of the two cases, that strategy was not objectively unreasonable. The trial court gave the jury a limiting instruction to insure that the jury would consider the evidence of the September 2 encounter only for the purpose for which it was offered. This Court presumes that juries follow their instructions “until the contrary is clearly shown,” *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), and defendant has not made any claim that the jury likely disregarded the

trial court's limiting instruction. Although defendant was ultimately convicted, "[t]he fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Because trial counsel's strategy was not objectively unreasonable, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause